IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 04 OF 2023

NADI MAGISTRATES COURT CASE NO. 1099 OF 2019

BETWEEN **DWAYNE HICKS**

Appellant

AND

STATE

Respondent

Counsel: Ms A. Bilivalu for Appellant

Mr J. Nasa for Respondent

Date of Hearing: 26 May 2023

Date of Judgment : 01 June 2023

JUDGMENT

1. The Appellant was charged with one count of Unlawful Possession of Illicit Drugs Contrary to Section 5(a)(ii) of the Illicit Drugs Control Act 2004.

2. He pleaded guilty to the charge on his own volition and admitted the summary of facts read in Court. Being satisfied with the unequivocally of the guilty plea, the learned Magistrate convicted the Appellant. The facts agreed by the Appellant are as follows:

> On the 27th day of August, 2019 at between 6.00am to 6.30am at Sikituru, Nadi, one Dwayne Hicks (Acc-2), 36 years, unemployed of Natokowaqa, Lautoka was arrested by PC 5472 Raduva (PW-1), of Sabeto Police

Station for being in possession of dried leaves believed to be Marijuana an illicit drug.

On the above date, time and place the Joint Police Operation Team led by ASAP Samuela (PW-2), Officer in Command of Namaka Police Station were conducting mobile patrol at Wailoaloa Beach when they discovered a vehicle, registration number JL 796 whereby the team directed the (Acc-2) and another to stop the vehicle. However, they drove off towards Sikituru Village, Nadi whereby the Joint Operation Team managed to stop the said vehicle. When (Acc-2) fled from the scene towards the village carrying a red bag, when suddenly (Acc-2) fell into a hole in the ground whereby he was arrested by (PW-1) soon after. (PW-1) then searched the said red bag and discovered 18 x Dried Plant Materials contained in a black plastic, 1 x Loose Dried Plants Materials and 1 x Dried Leaves both contained in a black plastic which was then seized and (Acc-2) was escorted to Namaka Police Station.

The seized drugs were taken for analysis on the 28th day of August, 2019 at the Fiji Police Forensic Laboratory whereby it was tested positive for Indian hemp botanically known as Cannabis Sativa.

The Results is as follows:

- 18 x Dried Plant Materials -136 grams
- 1 x Loose Dried Plants Materials - 212 grams
- 1 x Dried Leaves -368 grams

Total Weight 716 grams

(Acc-2) was then interviewed under caution whereby the allegation was then put to (Acc-2). (Acc-2) exercised his right to remain silent. (Acc-2) was charged for one count of Unlawful Possession of Illicit Drugs: Contrary to section 5(a) of the Illicit Drug Control Act 2004.

3. On 17 January 2023, the Appellant was sentenced to an imprisonment term of 25 months and 25 days'.

4. Being aggrieved by the said sentence, the Appellant filed this timely appeal on 25 January 2023 on the following two grounds:

(i) That the learned sentencing Magistrate may have fallen into error of principle and law when he adopted and selected a starting point above the tariff for Category 2 as encapsulated in *Sulua v State* [2012] FJCA 33; AAU0093.2008 (31 May 2012).

(ii) That the final sentence of 25 months 25 days' imprisonment is harsh and excessive given the application of the sentence outside the applicable tariff.

5. The Counsel filed written submissions and made further oral submissions when the matter was fixed for hearing. The Appellant participated in the hearing via Skype.

6. The Court of Appeal in Kim Nam Bae v The State [AAU0015 of 1998S (26 February 1999) explained the approach to be taken by appellate courts in dealing with a sentence appeal as follows:

> It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).

Ground 1 - Excessive Starting Point

7. The Appellant's contention is that the learned Magistrate fell into error when he selected a starting point above the sentencing tariff for Category 2 as encapsulated in Sulua (supra)

8. The Court of Appeal in Sulua set the sentencing tariff for all types of *cannabis sativa* offences under four categories solely based on the weight. Accordingly, Category 2 offences should attract an imprisonment term ranging from 1 to 3 years:

> (ii) Category 2: possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.

9. The total weight of *cannabis sativa* found in Appellant's possession was 716 grams that is more than 500 grams. Accordingly, his offence should attract an imprisonment term of more

than two years (24 months) but should not exceed three years (36 months). The starting point selected by the learned Magistrate was 54 months when the tariff ranged from 12 months to 36 months. Her worship had pitched the starting point above the tariff range. The contention of the Appellant concerns the starting point.

10. The Counsel for Appellant submits that pitching the starting point at 54 months is wrong in principle. Her argument is based on the Court of Appeal decision in Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013) where the Court observed:

> In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range. [paragraph 27].

11. I am unable to agree that the Court of Appeal in Koroivuki has laid down a sentencing principle. The sentencing principles are set out in the Constitution, (for e.g. proportionality principle) and the Sentencing and Penalties Act (for e.g. need to apply the current sentencing practice) In Koroivuki, the Court of Appeal has not laid down any binding principle but spoken of a good practice, supposedly based on the principle that, in the sentencing process, the courts must avoid double counting.

12. It is apposite here to discuss albeit briefly 'the principle against double counting'. If the sentencer without giving any reasons picks a starting point somewhere in the middle or above the middle range of the tariff, it is assumed that the aggravating factor(s) are subsumed in the starting point. A common complaint made in sentence appeals is that the sentencer has fallen into the trap of 'double-counting', ie reflecting one or more of the aggravating features of the case more than once in the process by which the sentencer arrives at the ultimate sentence.

13. When the gap between the starting point and where the sentencer ends up before considering the personal mitigation of the offender is so large, it suggests that something has gone wrong somewhere. The difficulty is that no one knows whether all or any of these aggravating factors had already been taken into account when the sentencer selected as

his starting point. If he did, he would have fallen into the trap of 'double-counting'. If the sentencer takes as his starting point somewhere within the appropriate range this wrong can be avoided. (Senilolokula v State [2018] FJSC 5; CAV0017.2017 (26 April 2018).

14. There is general consensus that the starting point should be within the tariff range. The real problem is where the judge should start within that tariff for a case without any aggravating or mitigating features. This problem has been highlighted before by the Supreme Court *Kumar v The State* [2018] FJSC 30 at paras 55 and 56.

Where within that range should the starting point have been?

15. There is no problem when there is established authority for what the starting point should be. For example, in the past, the starting point for the offence of rape was 7 years' imprisonment. The problem arises when there is no established authority for the starting point, but instead an appropriate range of sentence (sometimes referred to as the tariff) has been identified. For example, the appropriate range of sentence for the rape of a child (ie someone under the age of 18) is 11-20 years' imprisonment: see Aitcheson v [2018] FJSC 29; CAV0012.2018 (2 November 2018)]. The tariff set by Sulua for cannabis offences also comes within this latter category because it does not identify a fixed starting point but a sentencing range.

16. Then the question is- where within that range should the starting point be? There is here a difference in judicial opinion in this jurisdiction. The observation quoted above made by Goundar JA in Koroivuki, on which the learned Counsel for Appellant relies in support of her argument represents one such school of thought.

17. In the present case, the starting point (54 months) picked by the learned Magistrate has fallen above the tariff range. Her worship has not given any reason for doing so. Therefore, for argument sake, her picking the starting point above the tariff is obnoxious to the current sentencing practice.

18. However, the learned Magistrate in his Ruling has identified nil aggravating factors and ended up with a sentence of 25 months and 25 days' imprisonment, which is within the tariff

range of 36 months. Therefore, it cannot be said that the learned Magistrate has fallen into the trap of 'double counting'.

19. The question then is whether picking the starting point above the range of the tariff is wrong in principle. In Koroivuki Goundar JA said at [26]: "As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff." On the basis of this observation, a number of trial judges and magistrates choose the lower end of the range as a matter of routine.

20. However, the sentencing is highly individualised process and that judgment should not in my opinion be taken to curtail the sentencing discretion of the sentencers. In England there is a statutory duty to have regard to the guidelines issued by the Council (**R – v - Lee Oosthuizen** [2009] EWCA Crim 1737; [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing and Penalties Act. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi v -The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai – v - The State** (CAV 24 of 2014; 20 August **2015**) at paragraph 48:

> The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case.

21. This view is reinforced by the Court of Appeal in its recent Judgment in Baukari v State [(2022) FJCA 47 AAU 105.2016 (26 May 2022) where Gamalath JA has given a vivid description of how the issue of picking the starting points should be approached. I must reproduce the relevant paragraphs, albeit lengthy, as they provide a holistic view on the sentencing discretion of a sentencer when it comes to picking the starting points.

> [19] Having said, in relation to the issue of selecting an appropriate starting point, I wish to take a view from a different perspective in which the use of the judicial discretion should be given the pride of place. In my opinion the sentencing judges should be able to exercise a greater discretionary power in selecting a starting point within the basic parameters as laid down statutorily or otherwise. It is to be remembered that not every case that comes up for consideration would necessarily fit into the mould as laid down by different *dicta* or listed catalog of items that is to be followed assiduously as in a situation that requires the "ticking the boxes" approach to ensure the strict adherence. That I think is a regimental approach that would operate contrary to the use of judicial discretion in

sentencing. Operating within the basic norms of law and without falling in to the error of making overtly arbitrary decisions based on subjective criterion, a sentencing judge should be able to exercise his discretion in deciding on a starting point which is possible to be justified having regard to the factual matrix, assessed within the applicable law.

However then the inevitable question that comes up for consideration is whether this exercise would go contrary to the need for parity and conformity, which are secondary considerations in sentencing. In relation to this the basic structure introduced by the appellate courts or by a statutory provision in prescribing a starting point should remain as a guiding norm of law for the general consideration on sentencing of cases which would be clustered into a particular category. Deviations can be based on *sui generis* instances where the use of the judicial discretion can be justified based on objective criteria with which the complaint of falling into the error of arbitrariness could be negated.

Based on the facts of the case and the attendant circumstances a Judge should be able to justify the reason for the deviation and the reasons should be based on some cogent material. Easy to be discerned through the proceedings of a particular case.

[20] In dealing with the issue of selecting the accurate starting point in the case of **Parranto et al. v. the Queen**, 2021 SCC 46 , Supreme Court 39227, 12 Nov, 2021, (a case involving in dealing with a dangerous drug)the Supreme Court of Canada held in that ;

> *"..... There is no need to disavow the starting-point approach to sentencing. Sentencing ranges and starting points are simply different tools that assist sentencing judges in reaching a proportionate sentence. It is not for the Court to dictate which of these tools can or cannot be used. Provincial appellate courts should be afforded the respect and latitude to provide their own forms of guidance to sentencing judges, as long as that guidance comports with the principles and objectives of sentencing and with the proper appellate standard of review.* ***However, starting points must be properly treated as non-binding guidance by both sentencing and appellate courts and appellate courts must adhere to the deferential standard of review in sentencing appeals and to the Court's clear direction on how to account for starting points when reviewing sentences for errors in principle and demonstrable unfitness.*** *"*
>
> *"Sentencing is one of the most delicate stages of the Criminal Justice Process. It requires judges to consider and balance a multiplicity of factors and it remains a discretionary exercise. The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching the goal, and parity and individualization are secondary principles. Individualization is central to the proportionality assessment. Each offence is committed in unique circumstances by an offender with a unique profile. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and unique circumstances of each case. Sentencing courts are best-positioned to craft a fit sentence for the offenders before them. As for the appellate courts, they play two roles; consider the fitness of sentence appealed against and promoting stability in the development of the law while providing guidance to lower courts to ensure the law is applied consistently. Appellate courts are well-positioned to provide such guidance because of their appreciation of overall sentencing practices, patterns and problems in their jurisdictions."*
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> *"Appellate guidance may take the form of quantitative tools such as sentencing ranges and starting points, non-quantitative guidance explaining the harms entailed by certain offences, or a mix of both. Quantitative appellate guidance, generally starting points or*

sentencing ranges, operate to ensure sentences reflect the sentencing principles prescribed in the Criminal Code. Neither relieves the sentencing judge from conducting an individualized analysis. Sentencing ranges generally represent a summary of the case law that reflects past minimum and maximum sentences imposed by trial judges. Starting points are an alternative to ranges. The starting-point methodology has three stages: defining the category of an offence to which the starting point applies; setting a starting point; and individualization of the sentence by the sentencing court. Both reflect judicial consensus on the gravity of the offence. Irrespective of the preferred sentencing methodology, the purpose of the modality is to assist the sentencing judge in achieving the objectives and principles of sentencing, primarily proportionality. Ranges and starting points are simply different paths to the same destination: a proportionate sentence. Courts of appeal have discretion to choose which form of guidance they find most useful; however, because starting points are not binding precedents, parties seeking to challenge them need not have resort to a reconsideration application procedure".

"Sentencing decisions are entitled to a high level of deference on appeal. Deviation from a range or starting point does not in itself justify appellate intervention. Unless a sentence is demonstrably unfit or the sentencing judge made an error in principle that impacted the sentence, an appellate court must not vary the sentence. Ranges and starting points cannot be binding in theory or practice and appellate courts cannot apply the standard of review to enforce them. Directions in R. v. Arcand, 2010 ABCA 363, relating to the binding nature of starting points do not reflect the required standard of appellate review. It is not the role of appellate courts to enforce a uniform approach to sentencing through the application of the standard of review; rather, appellate courts must guard against undue scrutiny of the sentencing judge's discretionary choice of method. There is no longer space to interpret starting points or ranges as binding in any sense. Departing from a range or starting point is appropriate where required to achieve proportionality and exceptional circumstances are not required when departing from a range or starting point to achieve proportionality".

"Starting points do not relieve the sentencing judge from considering all relevant sentencing principles. Sentencing judges have discretion over which objectives to prioritize and may choose to weigh rehabilitation and other objectives more heavily than "built-in" objectives like denunciation and deterrence. Appellate sentencing guidance ought not to purport to pre-weigh or build in any mitigating factors and starting points should not be viewed as incorporating principles such as restraint or rehabilitation. Sentencing judges are not precluded from considering any factor that is built in to a starting point as mitigating in the individual circumstances and retain the discretion to weigh all relevant factors in their global assessment of a fit sanction. When setting starting points and ranges, inclusion of characteristics of an archetypal offender could impede individualization of sentences. Sentencing ranges and starting points are applicable only inasmuch as they solely speak to the gravity of the offence. By restricting starting points and ranges to strictly offence-based considerations, they will continue to be useful without fettering discretion or impeding individualization in a way that could produce clustering of sentences. Any risk of clustering is properly addressed by ensuring sentencing judges consider all factors relevant to each individual offender and by clarifying the proper standard of review on appeal."

[21] Referring to the issue of the 'Starting point' approach Supreme Court of Canada further held in **Parranto** (*supra*) that;

> *"The starting point approach seeks to reduce arbitrariness, disparity and idiosyncratic decisions-making in order to maintain public confidence in the administration of justice. Jail becomes the norm, starting point becomes hardened into fixed sentences, and factors leading to systematic discrimination are ignored or inadequately dealt with.*
>
> *The application of starting points by trial judge is another area in which the starting point approach is inconsistent with the principle of sentencing. Sentencing judges have less discretion to fully consider all relevant circumstances and are less likely to arrive at individualized and proportionate sentences. Starting points overemphasize deterrence and denunciation. They are defined solely in relation to the gravity of the offence. Moral blameworthiness and personal characteristics are secondary considerations. This is a methodological problem because the gravity of the offence and moral blameworthiness must be considered in an integrated manner to achieve proportionate sentences; sentencing judges using a presumptive sentence do not follow a frailly individualized process. Building some factors to the starting point effectively prescribes the weight to be given to factors, displacing the sentencing judge's discretion to determine their weight. Under the starting point approach, categorization is pivotal, and this improperly shifts the main focus from whether a sentence is just and appropriate to which judicially-created category applies. The starting point approach also balances sentences around a mediation. This clustering effect is unethical to individualization. Starting points are often established to emphasize deterrence and denunciation and to ensure more retributive punishment. This runs contrary to the objectives of reducing prison as a sanction and expanding use of restorative justice. As well, starting points make it more difficult for judges to give adequate weight to restorative justice principles because they are designed to move up and hard to move down. They explicitly or implicitly foreclose reliance on multiple mitigating factors, which risks overlooking lower, appropriate sentences."*

[22] As can be seen in **Parrento** the Supreme Court of Canada, while recognizing the rigidity in sentencing that comes along the wake of already fixed starting point approach on sentencing, expressed the concerns that that approach could possibly operate as a fetter in using the well measured discretionary power that a sentencing judge is expected to use by taking a holistic view having regard to multifarious factors of any given case. Further, in **Parrento** the exercise of applying the starting-point approach as a mechanism to foster deterrence as a promoter of retributive justice as opposed to rehabilitation and restoration has been discussed. Individualization, which is a vital consideration in determining the appropriate sentence is to a certain degree comes under restriction by the rigid application of the starting point approach and it indeed can have a negative impact on the exercise of discretion in sentencing.

[23] It is a degree of discretion being exercised by the sentencing judges that has universal recognition in deciding on the appropriate sentences. As Lord Chief Justice (ex) of England and Wales Tom Bingham stated in his seminal text "*The Rule Of Law" p. 53, Chapter* 4, "*Law not Discretion*" that "It is widely (and rightfully) regarded as important that judges should enjoy a measure of discretion when passing sentence on convicted criminals, since if they are unable to take account of the difference between one offence and another and between one offender and another." "The rule of law does not require that official or judicial decision makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."(*p.*54)

[24] Applying the above conceptual matrix to the impugned sentence imposed by the learned trial Judge in this case, what is clearly discernible from the reasons given in selecting the 10 years period as the starting point, the learned trial Judge had been persuaded by the fact that the exponential growth in the violence through sexual aggression directed towards women

> should be treated with a sense of harshness that would have a resounding impact of deterrence, a retributive impact, so that the society in general and women in particular will be ensconced in an atmosphere of protection in the environment to which they belong. Having considered the use of discretion by adopting a holistic view of the facts relating to the instant case I am unable to hold that the sentencing Judge erred in not conforming to the 7 years starting point.

22. In view of the above, I do not see any merit in the ground 01 raised by the Appellant.

Ground 2- Harsh and Excessive Sentence

23. The Appellant submits that the sentence fell '*outside the range of sentences'* for the offences of which the Appellant was convicted.

24. The final sentence has been 25 months 25 days' imprisonment, well within the prescribed tariff range. The contention of the Appellant concerns the starting point. Although the learned Magistrate has deviated from the current practice in selecting the starting point, she has placed the final sentence within the sentencing range of category 2, which is 12 months to 36 months. It is emphasised in the tariff itself that those possessing more than 500 grams of cannabis be sentenced to more than 2 years' imprisonment. There is no sentencing error.

25. In Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015), the Court of appeal observed as follows:

> [45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. **It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.** However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust. (emphasis added)

26. According to the facts admitted, the Appellant had tried to escape when his vehicle was ordered to be stopped. When it was stopped by the police officers, he tried to escape with

the bag containing the drugs. The police officers managed to arrest the Appellant only when he had fallen in to a hole in the ground. This indeed should have been considered as an aggravating factor which the learned Magistrate had not.

27. Therefore, an imprisonment term of 25 months and 25 days' is neither excessive nor harsh. There is no merit in this ground too. This appeal should be dismissed.

28. It should be in the best interest of everyone that the frivolous and unmeritorious applications seeking legal aid are discouraged or rejected at the vetting process so that the States' resources could be best utilized on deserving litigants.

29. *Following Orders are made:*

i The appeal is dismissed;

ii The sentence imposed on 17 January 2023 by the learned Magistrate at Nadi is affirmed.

Aruna Aluthge

Judge

At Lautoka

01 June 2023

Counsel:

- Legal Aid Commission for Appellant
- Office of the Director of Public Prosecution for Respondent